No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

WIRIN, KIDO AND OKRAND,
A. L. WIRIN,
FRED OKRAND,
257 South Spring Street, Los Angeles 12,
LEO GALLAGHER,
111 West Seventh Street, Los Angeles 14,
HERBERT GANAHL,
814 Merritt Building, Los Angeles 14,
Attorneys for Appellant.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
Counsel, American Civil Liberties Union,
Of Counsel.

FILED

PAUL P. O'BRIEN,
CLERK

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BRIEF FOR APPELLANT.

Jurisdiction.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered on February 5, 1947 [R. 26-27][1], denying the petition for naturalization filed by appellant pursuant to section 310(a) of the Nationality Act of 1940 (54 Stat. 1144-1145, 8 U. S. C. 710(a)) [R. 2-4]. The District Court's oral opinion [Tr. 385-403], which is not reported, constitutes, pursuant to stipulation and court order [R. 26] the District Court's find-

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[1]This Court granted appellant's application to have printed only the clerk's transcript of the District Court record, and to have the reporter's transcript of testimony considered in its original form [R. 33]. The latter will be referred to as "Tr." and the former as "R".

ings of fact and conclusions of law. The appellant objected to the District Court's findings, conclusions, and judgment [Tr. 403, R. 27].

Appellant resided at the time of the filing of the petition, and has continuously resided since that time, within the jurisdiction of the District Court. The District Court's jurisdiction rested upon Section 301(a) of the Nationality Act of 1940 (54 Stat. 1140, 8 U. S. C. 701(a)); and this Court has jurisdiction of this appeal, under Section 128 of the Judicial Code (43 Stat. 936, 28 U. S. C. 225(a)).

Statute Involved.

Section 310(a) of the Nationality Code (54 Stat. 1144-1145, 8 U. S. C. 710(a)), under which appellant's petition was filed, provides:

> "Any alien who, after September 21, 1922, and prior to May 24, 1934, has married a citizen of the United States, . . . may, if eligible to naturalization, be naturalized upon full and complete compliance with all requirements. of the naturalization laws, with the following exceptions:
>
> (1) No declaration of intention shall be required;
>
> (2) In lieu of the five-year period of residence within the United States, and the six months' period of residence in the State where the petitioner resided at the time of filing the petition, the petitioner shall have resided continuously in the United States for at least one year immediately preceding the filing of the petition."[2]

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[2]Appellant was married to a native-born American citizen on June 25, 1927 [R. 1].

Section 307(a) of the Nationality Code (54 Stat. 1142, 8 U. S. C. 707(2)) provides:

> "No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Statement of the Case.

PROCEEDINGS.

Appellant filed a petition for naturalization under Sec. 310(a) of the Nationality Act of 1940 in the District Court of the United States for the Southern District of California (Central Division) on September 25, 1945 [R. 1-4]. After a hearing upon the petition, the District Court sustained the Naturalization Examiner's objections to appellant's naturalization, and on February 5, 1947, denied the petition on the ground that appellant had failed "to establish his burden of proof of attachment to the principles of the Constitution of the United States and a favorable disposition to the good order and happiness of the United States" [R. 26].

FACTS.

Appellant immigrated to the United States with his mother from Russia in 1911 as a child of eleven [Tr. 210]. While attending Yale University he voluntarily enlisted and served in the United States Army in World War I [Tr. 211]. During his Army service he engaged in a ceremony which he believed had the effect of conferring naturalization upon him [Tr. 211, 214, 278-279, 282-284] and only found that his citizenship was not recorded when he attempted to comply with an announcement at the commencement of World War II that naturalized citizens should secure copies of naturalization certificates [Tr. 214-215, 278, 284-287].

Appellant graduated from Yale University in 1923 [Tr. 211], and after graduate work with a concomitant instructorship in history at the University of California, and a period of employment in religious work, he commenced teaching economics and history [Tr. 226] in 1929 at the Los Angeles Junior College, which thereafter became the Los Angeles City College [Tr. 213]. He served as an Associate Instructor [Tr. 36] until his resignation in 1940 [Tr. 216]. Since then, or at least until the District Court's denial of his petition for naturalization,[3] he was employed in making studies and surveys for Jewish social organizations, such as the study of personnel relations of Jewish employees which was being conducted at the time of the hearing [Tr. 222-223]. He lives with his wife, a native-born American citizen, whom he married in 1927 [Tr. 306-309] and his son, a student

[3]It was indicated that appellant would lose his employment as a result of the District Court's judgment [Tr. 277, 77-78, 166, 317].

at the University of California [Tr. 76], in a residential neighborhood of Los Angeles [Tr. 145].

The appellant's witnesses included a number of teachers who had taught at the City College at the time of appellant's employment there and all but one of whom have continued on the faculty to the present time [Tr. 62. 107, 111, 114, 116, 132, 136, 147, 189, 207]; neighbors [Tr. 143, 174, 203, 208]; well-established business and professional men in the community [Tr. 140, 159, 164, 182, 186, 207, 208]; members and officers of veterans' [Tr. 55, 57, 121-122, 207]; and teachers' organizations [Tr. 52, 57, 59, 176, 206] to which appellant belonged, former students [Tr. 67, 151, 197], clerics [Tr. 70, 75], and his wife [Tr. 306].

It is clear from their testimony that appellant is a public-spirited person who participates in civic, community, and religious organizations, taking an interest in his profession and in educational problems, in current events, and in the welfare of the community [Tr. 54, 74, 122, 184, 213, 219, 270, 275]. In the field of education he believed in the benefit to students of a knowledge of all schools of thought; in teaching economics he gave a factual description of all economic theories and systems to enable his students to achieve a rounded and open minded approach to economic questions [Tr. 217, 220, 228, 114-115, 154, 197-200].

In his personal approach to economic questions he was an open-minded and serious thinker, without doctrinaire adherence to any school of thought [Tr. 180. 228-229, 265, 270; and see lecture, R. 6-8]. From his study of economics and of conditions during the depression it seemed

to him at that time that no lasting prosperity could be achieved by capitalist ownership of industry and that the welfare of the people required that capitalism be supplanted by public ownership. However, on the basis of the experience with producers' and consumers' cooperatives since 1935, and the cooperative efforts of industry during World War II, he now believes that the capitalist organization of industry can and should be maintained, with some modifications [Tr. 242, 258, 260, 265-266]. He had at all times faith and confidence in American principles, believing that the Government of the United States is the best in the world, though capable of improvement [Tr. 229]; opposing totalitarianism; possessing great respect for the Bill of Rights; and believing that the American people can and should achieve the greater economic well-being in which he was interested, through American principles, rather than through the abandonment of them [Tr. 169-170, 173, 190-192, 72-73, 112-114, 139, 128, 65, 77, 120-121, 166, 183-185].

As to appellant's family life, his wife testified that he had imparted a greater appreciation of the American way of life to her, who, as a native-born American citizen was accustomed to take it for granted [Tr. 308, 306-309]. He imparted his interest in religion to his son [Tr. 213 270, 166] who was described as "as American as apple pie", and as evidencing his attachment to American principles [Tr. 184, 76, 56, 307, 204].

The Government's evidence was directed at attempting to establish that the instruction given by appellant during his tenure at the City College and the opinions he held

at that time demonstrated a lack of attachment to the principles of the Constitution. However, despite numerous efforts to adduce testimony damaging to appellant, the only testimony the Government was able to elicit as to the actual content of his teaching or opinions was as follows:

One of his former students [Tr. 10, 13] called to testify against him could not remember his advocating any particular form of government or ever discussing forms of government, nor at any time advocating collectivism [Tr. 13]. Another student's only support for his opinion that appellant "stressed collectivism" [Tr. 15] was that appellant stated as "a boy, working in a factory, that he worked at one little item all the time. He thought that was the way it should be done, and there was greater success, . . . you could succeed faster, and get more work done by everyone working together, and doing a small part" [Tr. 16]. Another student maintained that appellant was "favorable to Communism and Socialism" because he had said that if "a truck was going down the street with a red flag on back (because) it had a load of pipe or lumber on it, and that the newspapers, particularly the Hearst newspapers, would jump at the conclusion that the truck driver was a dirty Red. This . . . was designed to make the student believe, after all, the word 'Red' was not such a bad word, and maybe we ought to check into it a little bit and make up our own minds" [Tr. 34-35]. And the head of the Social Science Department, Professor Cruse, who had sat in unannounced

to observe some of appellant's classes, admitted, despite the fact that he and appellant had always been opponents with respect to methods of teaching economics [Tr. 41], that he had never heard appellant discuss forms of government nor, it is to be inferred from the testimony, make any statement to his class reflecting his political or economic viewpoint [Tr. 37, 42].[4]

The Naturalization Examiner's major emphasis was upon a lecture delivered by appellant during the depression, in 1934 or 1935, as an extra-curricular activity [Tr. 233-234]. This lecture began with praise of the American way of life and with appellant's statement of his faith in the possibility of improving economic conditions and ending the then existing situation of unemployment and "scarcity in the midst of plenty" [R. 5-6]. After discussing the value of constant evaluation and re-examination of theories and trends [R. 6-8], appellant described the resources of the United States and the existing depression [R. 8-13]. He then discussed various theories

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[4]While there is no serious reference to appellant as a Communist, and the District Court did not find appellant held any Communist belief, the appellation is mentioned by some of the witnesses against appellant [See Tr. 82, 38]. The background of the testimony may therefore be briefly noted: during the '30s and particularly during the depression years, there were "conservative" and "liberal" groups among both the students and faculty. The "liberal" instructors, despite their inclusion of ardent anti-Communists, and despite the fact that they have survived continuing investigations of radical activity [Tr. 43-44, 96-97], were referred to as "Communists" bv their opponents [Tr. 119, 114-115].

of organization of the economy, describing the booms and depressions of unregulated capitalism, the theory of state capitalism, and the basic principles of Fascism [R. 13-20]. He enunciated or quoted various criticisms of state capitalism and Fascism [R. 17-20] and then referred to collectivism as the antagonist of Fascism [R. 20]. He quoted the proponents of collectivism as proposing that "all resources, all lands and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication, should be, not private property but the common property of all those who work" [R. 20]. After outlining the stages through which the collectivist regarded it as necessary for society to pass in the development from capitalism to socialism, appellant concluded with the statement that "study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization" [R. 24].

Appellant explained that he had not believed at the time of the delivery of this lecture that there could be a successful and permanent revival of capitalism, but that, as noted above (p. 6), in view of the introduction of some collectivist measures thereafter, such as the establishment of producers' and consumers' cooperatives, and cooperative measures during World War II to increase production, he now believed that capitalism, with modifications, can and should survive [Tr. 242, 258, 265, 266].

The District Court's Findings of Fact, Conclusions of Law, and Opinion.

With agreement of the parties, the District Court directed that its opinion constitute the findings of fact and conclusions of law [R. 26].

Findings of Fact.

The Court found that except for the inferences to be drawn from the testimony of Professors Cruse and Frankian, and of those of appellant's former students testifying against him, and from the lecture delivered by appellant in 1934 or 5, appellant had supported his burden of proving attachment to the principles of the Constitution [Tr. 386].

On the basis of such testimony and such lecture the Court found that appellant believed in "collectivism" and did not believe in capitalist ownership and direction of industry [Tr. 387, 392, 396]. This finding was based on the following subsidiary findings:

> Appellant did not establish that in his lecture he was "not seeking to impress any particular philosophy upon his auditors" [Tr. 388].
>
> As to the philosophy he sought to impress, the Court quoted the parts of the speech which it regarded as most significant.[5] Appellant, in the portion quoted by the Court, discussed the possibility of

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[5]The lecture commenced with a statement that appellant's ideal picture of the United States was of a "land of opportunity for all, a land of plenty, one, the resources of which were sufficient to wipe out needs, hardships, and poverty for all honestly willing to work; a land in which cooperation and social-mindedness could create all necessities and comforts for all" [Tr. 389]. This and a few accompanying remarks were not regarded by the District Court as showing a lack of attachment [Tr. 390].

stimulating a revival from the then existing depression [see Judge's comment as to then current conditions, Tr. 392] by public construction or similar schemes and stated that such a revival "would still have in it the inescapable capitalist tendency to generate a renewed depression" because of " 'mal-distribution of income' " [Tr. 392]. This mal-distribution arose from the fact that "much too much profit went back to build new factories and too little found its way back to the people to buy the products from the factories we already had. . . . Too much was produced and too little was consumed in proportion as the margin between the value of goods produced and the value of goods consumed widened. . . .A boom under capitalism, which does not generate a new depression is impossible, since it is the inherent capitalist tendencies and contradictions that lead unavoidably to the logical slumps" [Tr. 393]. As a result, according to appellant, as quoted by the District Court, the historical view that capitalism should be entirely unregulated had been supplanted in recent years by advocacy of "a capitalist planned economic system" [Tr. 394]. But "capitalist planning" in appellant's view, was "highly paradoxical because planning involves the elimination of private enterprise and competition in the matter of kinds of goods produced . . . and so forth . . . (which are) the very props of capitalism [Tr. 395]. We cannot, consequently, build up much of a case for state capitalism" [Tr. 396].

Appellant then suggested that they take Fascism and Socialism "the newest arrivals into the laboratory and investigate the make-up and potentialities

and promises of each" [Tr. 397]. After discussing Fascism [Tr. 397], appellant stated that "the collectivist state, according to its proponents, in brief, proposes that 'all resources, all land and buildings, all manufacturing establishments, mines, railroads, and other means of transportation and communication . . . should be, not private property but the common property of all those who work'. It further proposes that . . . all members of society should be socially useful . . . that production and distribution of goods be planned scientifically to avoid anything resembling the crises of capitalist society. . . . But how is mankind to reach this state of practical idealism? The collectivist believes that it is necessary for society to go through four stages of development in the path from capitalism to socialism" [Tr. 398].

After describing these possible intermediate stages, appellant stated, according to the District Court's findings:

> "The last and final phase of this societal change will be the collectivist society—the ultimate goal. This time, coercive authority will have disappeared, everyone voluntarily participating in the co-operative commonwealth. This will be the real 'classless' society, with no wage system, no price, no money—a system based upon the principle of 'from each according to his ability, to each according to his need.' Thus, cryptly put, will evolve the state known as collectivism, a state which according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefulness, its mis-

> sion, its place in history of economic growth of mankind. It is man's ultimate goal." [Tr. 399-400.]

Appellant then concluded:

> "In conclusion may I say that the choice we are asked to make lies before us. If an economic system is to be judged on the basis of a worth-while standard of living for every man, woman and child under it, then we must choose accordingly. * * * economic planning for all is wholly inconsistent with, and impossible under, unchecked capitalism. On the other hand, this study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization." [Tr. 400-401.]

The Court further found that appellant had not established that he had changed his attitude from that which he possessed at the time of his lecture [Tr. 401], and he was to be deemed to possess this attitude during the period here in issue: September 25, 1944 to September 25, 1945 [see Tr. 2].

Conclusions of Law and Opinion in Support Thereof.

The District Court concluded that the burden of proving attachment to the principles of the Constitution is upon the appellant [Tr. 385-386, 402-403].

The Court concluded that appellant had not established that he did not believe in economic "collectivism."

The Court concluded that "collectivism" is not consistent with the principles of the Constitution and that because of appellant's belief in "collectivism" he was not to

be deemed attached to the principles of the Constitution and well disposed to the good order and happiness of the people of the United States [Tr. 386, 402].

The District Court expressed the opinion that the economic and property relations existing under capitalist ownership and direction of industry were to be deemed a part of the processes of Government of the United States and were dictated by the Constitution to be a part of such processes [Tr. 387, 392, 396].[6]

Specification of Errors.

The District Court erred

1. In its findings of fact that appellant continued to possess the belief in "collectivism" of industry, which the Court deemed inconsistent with the principles of the Constitution, during the period in which the statute required appellant's attachment to such principles of the Constitution: that is, September 25, 1944 to September 25, 1945; and the District Court therefore erred in its conclusion, on the basis of such finding, that appellant had not sustained the burden of proving such attachment.

2. In its conclusion of law that the belief in "collectivism" of industry which it found appellant to possess is inconsistent with the principles of the Constitution, and in its holding on the basis of such conclusion that appellant had not sustained the burden of proving attachment to such principles.

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[6]Thus, the Court stated, on the basis of appellant's statement that the depressions were inevitable under capitalism, that appellant believed the results would be "disaster" no matter "how the processes under the Constitution shall be invoked or employed" [Tr. 396] and such a criticism of capitalism, the District Judge believed, showed a tendency not to "support . . . the government of the United States, under the Constitution" [Tr. 392].

POINTS TO BE ARGUED AND SUMMARY OF ARGUMENT.

I. Assuming the Validity of the District Court's Conclusion That the Belief in Collectivism Appellant Possessed in 1934 Was Inconsistent With the Principles of the Constitution, the District Court Erred in Its Finding That Appellant Continued to Possess Such Belief During the Year Prior to His Petition. The Court Therefore Erred in Its Conclusion on the Basis of This Finding That He Was Not Attached to Such Principles During This Period.

We emphatically believe, and shall demonstrate in Point II, that the belief in collectivism which the District Judge attributed to appellant cannot, as a matter of law, be deemed to indicate a lack of attachment to the principles of the Constitution. However, purely *arguendo,* we are assuming in this point that it could be so deemed.

The only support for the finding that appellant believed in the inability of the capitalist organization of industry to survive and to maintain prosperity, and in the necessity for supplanting it with collectivism, is the lecture he delivered in 1934 or 5. While the testimony of two students relates to the appellant's teaching until as late as 1940 and the testimony of one professor may also so relate, the testimony of these and the few other student and teacher witnesses against appellant is too self-contradictory, vague and insubstantial to be deemed support for a finding that the beliefs he possessed in 1934 or 5 continued. The inference which might be drawn in the absence of evidence to the contrary that the beliefs he then held continued, is refuted by uncontradicted, credible, and convincing evidence which the District Court without justification ignored. Accordingly, appellant sustained the burden of proof, if it rested upon him, that he did not hold in 1944

the beliefs he may have possessed in 1934 or 5 as to collectivism. Inasmuch as the District Court found that but for such beliefs, appellant sustained the burden of proving attachment, it must be held that he sustained such burden.

II. Assuming the Validity of the District Court's Findings of Fact, It Erred in Its Interpretation of the Principles of the Constitution, and It Consequently Erred in Its Holding That Appellant Was Not Attached to Such Principles and Was Not Well Disposed to the Good Order and Happiness of the United States Within the Meaning of the Naturalization Law.

It is established by the decision of the Supreme Court in *Schneiderman v. United States,* 320 U. S. 118, that a belief in the necessity of economic change of an even more drastic nature than that which the District Court attributed to appellant, is consistent with the principles of the Constitution to which attachment is required by the naturalization law; and the *Schneiderman* ruling is controlling on this question of law in the instant case. Accordingly, appellant's purported belief cannot be deemed to indicate a lack of attachment to the Constitution, and inasmuch as the District Court ruled that but for such belief appellant had carried the burden of proving attachment to the Constitution, appellant must be deemed to have established such attachment.

The District Court did not find that appellant believed in change in the political organization of the government of the United States; such a finding would not in any event have support in the evidence. Furthermore, the only mention of political action which, *arguendo,* could possibly be considered to represent appellant's belief, is consistent with the principles of the Constitution under the *Schneiderman* decision.

POINT I.

Assuming the Validity of the District Court's Conclusion That the Belief in Collectivism Appellant Possessed in 1934 Was Inconsistent With the Principles of the Constitution, the District Court Erred in Its Finding That Appellant Continued to Possess Such Belief During the Year Prior to His Petition. The Court Therefore Erred in Its Conclusion on the Basis of This Finding That He Was Not Attached to Such Principles During This Period.

Assuming, *arguendo,* that belief in a collectivist organization of the economy and in public rather than private ownership of industry is tantamount to a lack of attachment to the Constitution, we submit that the finding that appellant held such beliefs in the period from September, 1944 to September, 1945, is clearly erroneous. While we concede, in view of the weight to be accorded to the District Court's findings, that the lecture delivered by appellant in 1934 or 5 supports the view that he then did not believe in the future of capitalism, and believed that collectivist ownership of industry was essential for a stable prosperity, there is no evidence to support the finding that he possessed such beliefs after that time.

While the District Court refers to the testimony of former students who testified for the Government, and of Professors Cruse and Frankian as corroborating the fact that appellant possessed the views expressed in the lecture, such testimony is entirely lacking in substance. Professor Cruse admitted that in his observation of appellant's classes he had never heard appellant express any viewpoint whatsoever [Tr. 37, 41-42], and the most positive adverse statement the Naturalization Examiner could

elicit from Professor Cruse as to appellant's views was as follows:

> "Q. As to Mr. Wixman's views about Communism, were they favorable or unfavorable, as you remember them? A. As a general principle I felt that Mr. Wixman rather favored the idealogy of Communism.
>
> Q. Is there anything that you can recall that led you to feel that? A. There is nothing other than the general opinion you get from discussing the subject with any individual." [Tr. 38.]

And this testimony must be evaluated in the light of Professor Cruse's own admission that in fact he knew "not at all what the political faith of Mr. Wixman is" [Tr. 41], and his statement that his and appellant's views were out of harmony in general [Tr. 38] and on the question of teaching methods [Tr. 4]; such a general bias against the appellant cannot be ignored as a factor further discounting the probative force of Professor Cruse's already insubstantial, vague, and self-contradictory testimony.

As to the other professor-witness against appellant, although he had visited in appellant's home [Tr. 83], he was apparently unable to recall any expression of view by appellant indicative of a belief in econonmic or political change. All that could be elicited from him as to appellant's views was:

> "Q. Did you ever have any conversation with Mr. Wixman which involved political economic questions? A. No, not that I recall.
>
> Q. Specifically, did you ever discuss the subject of Communism? A. No.

Q. Did anyone else ever discuss Mr. Wixman with you? A. I have had a number of students complain about him.

Mr. Ganahl: Just a minute. I object to that * * * when it goes as far as to say John Doe told Richard Roe who told me John Doe said something, then it certainly has its limitations. * * * I might make the suggestion that we had here this morning a number of students, and those students reported to this witness. Why can't they be brought in?

The Court: I don't know.

Mr. Ganahl: I would like to object upon the ground that it is irrelevant, and hearsay.

The Court: Objection overruled.

The Witness: It was common belief on the campus by a great many students that he was a Red.

The Court: Upon what do you base that deduction you have, Professor?

The Witness: Your Honor, when they come and say, 'Well, we heard another lecture on Communism,' —they might have been exaggerating, I don't know, but I am of the belief that where there is smoke there is fire. It was not from one person. It was a number of persons. If you should ask me who those people are I could not recall names ten or twelve years later, but that was my direct impression." [Tr. 81-82.]

The statement quoted from these students apparently merely meant that they did not share appellent's view that enlightenment on all theories was desirable [Tr. 217, 228; see also 114-115, 159, 197-200]; for in spite of their ob-

vious bias, they could not even find any basis for alleging that appellant was advocating any particular theory [Tr. 90]. And Professor Frankian admitted in effect that he based his view of appellant on conversations only with those students who disliked appellant [Tr. 83] and to whom he was a faculty adviser [Tr. 85]. The fact that his informants were only a small selected group who found common ground with Frankian by reason of their disapproval of appellant also seems apparent from the fact that while he concluded from his group that appellant's reputation on the campus was "not very good" [Tr. 82] the instructor who interviewed most of the students in the school in connection with their vocational guidance testified that he was generally highly regarded [Tr. 136-137, 139-140; compare 189-190]. It also seems apparent that Professor Frankian, with Professor Cruse, was intent on "getting" something on appellant [Tr. 88] and that the students who conferred with Frankian about appellant shared this view [Tr. 90].

As to the student-witnesses against appellant, it is not an exaggeration to state that their testimony is even less substantial than that of the professors. While one student gave it as his opinion that appellant was "favorable to Communism and Socialism," the meaning of this generalization is illuminated by the student's view that appellant showed such favoritism because appellant had suggested that the students should make up their own minds as to whether a person was a "Red" if he was so labeled in a rash and prejudiced manner [Tr. 34-35]. From an-

other student the opinion was elicited that he regarded appellant as a "collectivist." That this opinion was entirely lacking in probative value is demonstrated by this student's explanation that appellant's collectivist belief was demonstrated by appellant's remarking on the efficiency of specialization of labor [Tr. 16].

Further, the testimony of both must be weighed against their background of immaturity [Tr. 47, 21, 194] and the fact that as a result, they might have regarded appellant's attempt to give an objective description of various schools of thought as advocacy. The latter inference is strengthened by the fact that neither Professor Cruse, who observed appellant's classes, nor Professor Frankian, who conveyed reports from numerous students, nor an American Legion investigator who had student informers [Tr. 95-98], could refer to any instance of advocacy of any belief by appellant. Furthermore, other students, both appearing for the Government and for appellant and another professor, testified that they knew of no such advocacy, and that appellant had discussed all theories in a scientific and objective manner [Government's witness, Tr. 26; appellant's witnesses, Tr. 154, 197-200, 114].[7]

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[7]It may be observed that the view of the two students quoted above that appellant "favored" some of the theories he described may have been because of the contrast between his teaching and that of Professor Cruse who, while supplying his students with a reading list similar to appellant's, seems to have emphasized his condemnation of the views of those authors with whom he disagreed [Tr. 42].

Finally, besides the contradictions and vagueness of the testimony against appellant, it must be weighed against the setting of the times; the strength of feeling during the depression against those of differing views; the factionalism at the College with "liberals", including anti-Communists termed Communists [Tr. 114-115, 109, 119, 190-192]; a pro-Nazi movement [Tr. 305]; and a continuous investigation of radical activities with students utilized as informants [Tr. 95-97], with all of the gossip and rumor that such utilization would inevitably entail.

Even without this background, which throws considerable light on the obvious exaggerations in the testimony, we submit, with due deference to the District Court, that the generalities and conjectures of these witnesses cannot be deemed evidence to support a finding. It is also to be borne in mind that none of these witnesses was acquainted with appellant subsequent to the termination of his teaching in 1940, and Professor Frankian explicitly related his testimony to the years from 1935 to 1937. Thus, we submit that there is no testimony sufficient to support a finding that appellant believed in collectivism in the year of 1944-45. While the lower Court's consideration of the evidence carries great weight, its finding cannot be supported if it has failed to discount obviously contradictory and incredible testimony and if there is no supporting evidence properly deemed of probative value. Compare *In re Bogunovic,* 18 Cal. (2d) 160, 114 P. (2d) 581; *Weber v. United States,* 119 F. (2d) 932 (C. C. A. 9, 1941).

Accordingly, the only support for the conclusion that appellant disbelieved in a capitalist economy in 1944-45 is the inference which might be drawn in the absence of evidence to the contrary that the beliefs he held in 1934 continued until that time. This inference, however, is refuted by credible, uncontradicted, and convincing evidence which the District Court ignored.

Appellant testified, without contradiction, that while he had not believed in 1934 that a stable prosperity could be maintained under private ownership of industry, the formation of producers' and consumers' cooperatives since 1934 and cooperative efforts during World War II had shown that capitalism could be modified and revived and that he had therefore altered the view he had held as to the future of capitalism during the depression of the 30's [Tr. 242, 258-259, 265]. Considering appellant's role as a student and observer of economic phenomena, evident in the lecture and the record as a whole, the fact that he was not a doctrinaire follower of any school of thought [Tr. 180, 228-229, 270, and R. 6-8]; that even the lecture in 1934 in the first instance, while favoring a socialist economy at that time, was not given in a dogmatic vein; the frequency of changing diagnoses of our economic difficulties by many experts over the last decades in correspondence with economic developments; the appellant's lack of evasiveness in his testimony as to his views—considering all of these factors, appellant's testimony is highly credible. Indeed, the Court gave no indication in its findings or otherwise that it deemed appel-

lant other than veracious; and the Court cannot ignore uncontradicted testimony by the petitioner without grounds therefor. Compare *Schneiderman v. United States,* 320 U. S. 118, 141-142.

Further, appellant's testimony is supported by that of several witnesses whom the District Judge found were "very reputable and responsible" [Tr. 401]; they had engaged in discussions of viewpoint with appellant in recent years, and appellant had seemed to them to support the right to private property and not to advote a collectivist ownership of property [Tr. 173-174, 190-192, 135-136, 72-73]. It is true that some of the appellant's witnesses had not engaged in an exchange of views with him; but in characterizing the testimony of all of appellant's witnesses as "negative" [Tr. 40], the District Judge ignored the testimony of those who had so engaged.

In summary, we submit that the finding that the belief appellant possessed in 1934 continued until 1944 has no support other than the assumption that a once-held belief continues; that this assumption is fully refuted by the evidence submitted by appellant; and that appellant has fully sustained the burden of proof, if it be his to sustain, that he did not continue to possess such belief in 1944-45. Accordingly the finding must be reversed as clearly erroneous; and since but for this finding the District Judge found that appellant had sustained the burden of proving attachment to the Constitution [Tr. 386, 401], he must be deemed to have sustained that burden.

POINT II.

Assuming the Validity of the District Court's Findings of Fact, the Court Erred in Its Interpretation of the Principles of the Constitution of the United States, and It Consequently Erred in Holding That Appellant Was Not Attached to Such Principles and Was Not Well Disposed to the Good Order and Happiness of the United States, Within the Meaning of the Naturalization Law.

We do not dispute the District Court's finding that at the time of appellant's 1934 lecture, on which the District Court's holding was largely based, appellant favored increased prosperity for the majority of the population through "collectivist" measures and that was then highly pessimistic as to the possibility of securing lasting prosperity for this country under capitalist ownership of industry. And we shall assume *arguendo,* though we submit we have established the contrary in Point I, that the beliefs held by appellant in 1934 have continued to the present time. We believe, however, that such beliefs, which the District Court held to be contrary to the principles of the Constitution, are consistent therewith under clear, definitive, and controlling rulings of the Supreme Court; the District Court therefore erred in holding that the possession of such beliefs established appellant's lack of attachment to the Constitution.

In *Schneiderman v. United States,* 320 U. S. 118, the Supreme Court made a complete exploration of the social, economic, and political principles to which an alien must be attached to be eligible for naturalization. It is clear, as will be demonstrated below, that the principles which the District Court held to negative attachment to the Constitution are not contrary to the "principles of the Consti-

tution", according to the ruling in that case, or even according to the more stringent rule propounded by the dissenting minority therein. And the question involved in the case at bar is wholly governed by the *Schneiderman* holding. It is true, as the District Judge pointed out [Tr. 312, 385], that the portion of the *Schneiderman* opinion dealing with weight of the evidence and burden of proof relates only to denaturalization and is inapplicable to the instant proceeding. But its answer to the question: "What are 'the principles of the Constitution' to which attachment is required for naturalization?"—is obviously controlling on this question of law regardless of the nature of the proceeding. And the appellant, yielding *arguendo* to the District Judge's finding of fact as to his belief in collectivism, is here challenging the District Judge's conclusion only on this question of law. As the Supreme Court stated in the *Schneiderman* opinion: "To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning" (302 U. S. at p. 133). In this Point we are not questioning the proof adduced but only the meaning the District Court gave to the statutory requirement.

At the outset, and of primary importance in the instant case or in any consideration of the content of "principles of the Constitution", is the Supreme Court's opinion on the extent to which a belief in improvement through change in existing conditions is countenanced by the Constitution. On this point the Court stated in the *Schneiderman* opinion:

> "The constitutional fathers, fresh from a revolution, did not forge a political straitjacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of

> thought, soon followed. Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. . . . This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical change is necessarily not attached to the Constitution. . . . As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that . . . (one) thinks it can be improved' . . . Criticism of, and the sincerity of desires to improve the Constitution should not be judged by conformity to prevailing thought because, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought'." (320 U. S. 137-138.)

Thus, and this is a view to which the dissenters likewise adhered,[8] the "principles of the Constitution" countenance a belief even in the abrogation of some of its explicit provisions for one of those very principles is freedom to consider, advocate, and effect changes in the Constitution and in existing conditions. It is only the general system of government, of the United States, rather than the particulars of the pattern existing thereunder at any particular time, to which the naturalization law requires attachment. The doctrine applied in the *Schneiderman* decision that the "principles of the Constitution" within the meaning of the naturalization law, do not preclude, and in fact encourage, a belief in change and growth through

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[8]See dissenting opinion, 320 U. S. at p. 195.

freedom of thought, was also influential in the holding in *Girouard v. United States,* 328 U. S. 61, overruling *United States v. Schwimmer,* 279 U. S. 644, and *United States v. MacIntosh,* 283 U. S. 605.[9] To like effect, see *Baumgartner v. United States,* 322 U. S. 665.

This view of the "principles of the Constitution" is but another expression of the traditional philosophy that "It is a Constitution we are expounding." For it is an instrument with the breadth and flexibility to permit of adoption to the exigencies of "the changing course of events" (Stone, C. J., in *United States v. Classic,* 383 U. S. 299, 316). And as a corollary of the philosophy that it is through adaptability that our Constitution and government can endure, stands the primary principle of the Constitution "that the ultimate good desired is better reached by free trade in ideas . . ." (Holmes, J., dissenting in *Abrams v. United States,* 250 U. S. 616, 630.)[10]

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[9]In the *Girouard* case, the Court, by Douglas, J., quoted the Holmes dissent in the *Schwimmer* case with respect to the principle of thought; and it overruled the holdings in the earlier cases that the "duty by force of arms to defend our government . . . is a fundamental principle of the Constitution" (*Schwimmer* opinion, at p. 650), stating that the government may be defended in other ways and that willingness to bear arms is not essential to attachment to our institutions.

The less inclusive view of the principles of the Constitution adopted in these recent decisions will prevent a situation such as that in *United States v. Villaneauva,* 17 Fed. Supp. 485 (D. Nev. 1936) dealing with a petition for naturalization during the existence of the prohibition amendment and reapplication after repeal.

[10]Thus, the authors of the Constitution "chose (by the First Amendment) to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance" (Black, J., in *Martin v. Struthers,* 319 U. S. 141, 143.) As to the purpose of this Amendment, see also Jackson, J., in *Board of Education v. Barnette,* 319 U. S. 624, 642, stating that the "freedom to differ" includes "the right to differ as to things that touch the heart of the existing order."

As to the particular type of economic change which the District Court found appellant in favor, the Supreme Court held clearly and definitively in the *Schneiderman* case that a belief in such change is consistent with the principles of the Constitution to which the naturalization law requires attachment. For the District Court based its judgment on its finding that appellant believed in "collectivism", finding that but for this belief he had sustained the burden of proving attachment [Tr. 386]. And by "collectivism", the District Judge referred to the abrogation of the ownership and control of production by private industrialists—the salient feature of capitalism—and the substitution therefor of public ownership of industry (see Findings of Fact and Conclusions of Law, *supra,* pp. 10 and 13). That this is the meaning of "collectivism" as used by the District Judge is clear not only from his opinion but from his other statements in the record as to capitalism and collectivism and the latter's inconsistency with constitutional principles [Tr. 239-240. 243, 287, 292, 295, 296-299]; from the thrust of the questioning of appellant as to his economic beliefs [Tr. 297-8. 287, 228, 263-264, 265]; and from the usages of the term by the appellant in his lecture and in his testimony [Tr. 91-292, 263-264, 258].

While the beliefs involved in the *Schneiderman* case envisaged far more drastic changes than did the belief the District Court attributed to appellant, the Supreme Court had occasion there to hold *inter alia* as to the consistency with the Constitution of a belief in collectivism. And the Supreme Court held that the present method of capitalist ownership of industry is not guaranteed by the Constitution nor to be deemed a principle of it, and that public or

collectivist ownership is not contrary to such principles. On this point the Court stated:

> "It is true that the Fifth Amendment protects private property, even against taking for public use without compensation. But throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of government ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden. Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution?" (320 U. S. at 141.)

And it is to be noted that the minority, while taking the position that compensation to the owners of property appropriated by the State was required by the principles of the Constitution, indicated that such appropriation was consistent with these principles if compensation was made. (See 320 U. S. at pp. 181, 194.) In the instant case, there is no indication in the findings that appellant did not believe in such compensation and the only evidence in the record on this point is that he did [Tr. 265].

While it is presumptuous on our part to consider the support for a point on which the Supreme Court has so clearly held, we submit that the taking of private property for public use is restrained under the Constitution as it now stands only by the due process clause requirement that the taking be reasonably necessary for the public welfare

and that compensation be paid. Thus, even assuming that these restraints were to be deemed part of the immutable principles of the Constitution (an assumption in part negatived by the majority in the *Schneiderman* case), belief in the collective ownership of industry is in no way inconsistent with the Constitution. This is particularly true since such belief is premised on the view that the transition from private to public ownership is reasonably necessary, in fact indispensable, to the public welfare. That this transition has been made frequently throughout our history—the obvious example being the present Government conduct of the carriage of the mails—is commonplace knowledge.[10a]

NO FINDINGS THAT APPELLANT BELIEVED IN ANY POLITICAL CHANGE

It cannot reasonably be inferred from the District Court's opinion[11] that it found appellant to possess any belief as to political change, and it is therefore unnecessary to consider the doctrine as to what political objectives are inconsistent with the principles of the Constitution. For the sole reference in the opinion to possible methods of achieving political change is in the passage which the District Judge read from appellant's lecture in which he quotes the stages which the proponents of collectivism state would be followed in the development from capitalism to

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[10a] If public ownership were undertaken by the Federal Government, it would of course have to bear a reasonable relation to one of that Government's Constitutional objectives, such as the advancement of commerce.

[11] Compare *Stubbs v. Fulton National Bank of Atlanta*, 146 F. (2d) 588, 560 (C. C. A. 6, 1945); *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F. (2d) 704, 705-706 (C. C. A. 3, 1941).

socialism. It seems clear that there was no intention on the part of the District Judge to find that this passage represented appellant's belief, for he makes no comment with respect to it, discussing only, as pointed out above, appellant's economic viewpoint, his belief in collectivism, and his pessimism about prosperity under capitalist ownership and direction of industry. This omission must be deemed deliberate in view of several attempts by the Naturalization Examiner to indicate that appellant believed in a change in political forms.[12]

To attribute to the District Court a finding that appellant had any belief as to political change that it deemed inconsistent with the Constitution would, we believe, be setting up a strawman to knock it down, for such a finding would require reversal as clearly erroneous. For there is not a word of testimony in the record as to appellant having any belief as to political forms other than a belief in democracy and the Bill of Rights, and abundant testimony that he did so believe; he believed in bettering our economic welfare through the observance of American principles rather than through their abandonment [Tr. 169-

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[12]Furthermore, the District Judge states that his conclusion that appellant possessed a belief inconsistent with the principles of the Constitution is based on the lecture as corroborated by the testimony of the professors and the students [Tr. 386]; since there is no testimony as to appellant's belief in any political method for achieving economic change, the finding as to appellant's belief could hardly have been intended to include a finding that he believed in any particular political method.

170, 173, 190-192, 72-73, 112-114, 139], considering the government of the United States to be the best in the world [Tr. 229; and see p. 6, *supra*].

As to attributing to appellant the point of view quoted in his lecture as to the possible development and results of collectivism, it is to be noted that such viewpoint related to far-distant and ultimate developments. Accordingly, even if appellant, instead of discussing this view academically, had himself possessed it, it would have been subject to change in the light of intervening developments long before the period under discussion.

Thus a finding that appellant believed in 1944-45 in achieving collectivism through the political methods mentioned in his 1934 speech, would have been clearly erroneous because it would have been based solely on an academic statement he made eleven years before that some theoreticians believed in a theory of methods to be used in the indefinite future, and because, moreover, appellant was an electric thinker (see *supra,* p. 23), who was not in any event closely identified with such theorists.

It is to be noted that even if a finding had been made that appellant believed in the political methods mentioned in the 1934 lecture and even if the finding were supported, such belief would not be inconsistent with the principles of the Constitution as declared by the Supreme Court. For it would seem that the view under discussion foresaw in general that the changes being advocated would be affected through the existing pattern of political organiza-

tion;[13] and even "aims (that) are energetically radical", may be sought within "the framework of democratic and constitutional government" (*Bridges v. Wixon,* 326 U. S. 135, compare *United States v. Rossler,* 144 F. (2d) 463 (C. C. A. 2, 1944)). In any event it is uncontrovertible that "no present violent action" was called for. On this point the Supreme Court, again emphasizing the need for "freedom of thought" (320 U. S. at p. 158), stated in the *Schneiderman* decision:

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time —prediction that is not calculated or intended to be

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[13]For, while the theory appellant cites refers to the "dictatorship of the masses," it appears, as the Supreme Court stated, that such "dictatorship" refers to "control by a class, not a dictatorship in the sense of absolute and total rule by one individual" (*Schneiderman v. United States,* at p. 142). Such control does not necessarily involve "the end of representative government or the federal system" and so long as it does not do so, it is not inconsistent with the principles of the Constitution (*ibid*). And since under the theory of the collectivists, the "masses" are synonymous with the majority of the population [See Tr. 398], control by the masses is entirely consistent with the continuance of representative government. The fact that the government is to serve "as far as possible for the advantage of the working-class" is not incompatible with the Constitution (*Schneiderman v. United States* at p. 141), particularly inasmuch as it is, by definition, the majority. And even if force must be used by the majority to maintain itself in power, this is not inconsistent with the Constitution (*ibid* at p. 157), since police measures by a government representing the majority against a rebellious minority are not anti-democratic.

presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. . . . Because of this difference we may assume that Congress intended, by the general test of 'attachment' in the 1906 Act, to deny naturalization to persons falling into the first category but not to those in the second." (320 U. S. 157-158.)[14]

Finally, though it is unnecessary for the purposes of the case at bar to press this argument, it is to be observed that if the naturalization law were interpreted so as to prohibit naturalization of those who merely discussed change —even if the change were inconsistent with the Constitution—without creating "a clear and present danger" of affecting it, a serious question as to the constitutionality of the law would be raised.[15]

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[14]It is also to be noted that even the belief the District Court found appellant to possess as to economic change from capitalist to collectivist control of industry (discussed *supra*) did not encompass a belief in the need for immediate effectuation of such a change.

[15]Though naturalization is a "privilege," the grant of the privilege cannot be conditioned upon the non-exercise of constitutional rights. Compare *Frost v. Railroad Commission of California,* 271 U. S. 583, 594; *Hague v. C. I. O.,* 307 U. S. 496, 515; *Murdock v. Pennsylvania,* 319 U. S. 105, 110-111. The guarantee of free speech extends to alien as well as citizen (*Bridges v. Wixon,* 326 U. S. 135), and such guarantee permits restraint of speech only when such speech presents a clear and present danger of a substantive evil the legislature has the right to prevent. *Thomas v. Collins,* 323 U. S. 516, 530; *Bridges v. California,* 314 U. S. 252, 263; *Thornhill v. Alabama,* 310 U. S. 88, 104. Thus, if the "principles of the Constitution," within the meaning of the naturalization law were construed so as to negative attachment to the Constitution on the basis of speech which did not create such danger, the law would force the alien to forego his constitutional right to free speech in order to establish his eligibility for naturalization; and the law would for this reason be unconstitutional.

In summary, the District Court erred as a matter of law in its conclusion that the belief in collectivism it found appellant to possess was inconsistent with the principles of the Constitution within the meaning of the naturalization law, and was evidence of lack of attachment to such principles because (1) a belief in the desirability of change in existing conditions is not only consistent with the "principles of the Constitution" but is encouraged by the Constitution's underlying philosophy of flexibility to meet the exigencies of changing times, and by its basic principle of the value of a free trade in ideas; (2) the "principles of the Constitution" do not prohibit a transition from private capitalist, to public collectivist, ownership and direction of industry and a belief in the desirability of the latter is in no way inconsistent with such principles and cannot therefore be deemed evidence of a lack of attachment thereto; (3) the District Court did not find that appellant possessed any belief as to political methods which it deemed inconsistent with the Constitution; any such finding would be unsupported; and the only belief as to political methods which could possibly be attributed to appellant was in any event consistent with the principles of the Constitution.

Conclusion.

We respectfully submit that the District Court erred both in its findings of fact and conclusions of law and that its judgment should be reversed.

Wirin, Kido and Okrand,
A. L. Wirin,
Fred Okrand,
Leo Gallagher,
Herbert Ganahl,
Attorneys for Appellant.

Arthur Garfield Hays,
Osmond K. Fraenkel,
Nanette Dembitz,
Counsel, American Civil Liberties Union,
Of Counsel.